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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1328

KAISER STEEL CORPORATION,
a Nevada Corporation,
Petitioner,

vs.

W. S. RANCH COMPANY,
a New Mexico Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Tenth Circuit denying Petitioner's Motion to Stay Proceedings, entered February 1, 1968, after its Order dated October 12, 1967, reversing the Judgment of the District Court.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of New Mexico is printed in Appendix B hereto, *infra*, p. A4. The opinion of the United States Court of Appeals for the Tenth Circuit reversing the District Court's decision is printed in Appendix B hereto, *infra*, p. A10, and reported in 388 F.2d 257. The Order of the Court of Appeals denying Petitioner's Motions for rehearing and to stay proceedings, and the dissenting opinion of Judge Brown, Chief Judge, United States Court of Appeals, Fifth Circuit, sitting by designation, is printed in Appendix B hereto, *infra*, p. A20, and reported in 388 F.2d 262. The opinion of the New Mexico Supreme Court in a related case between the same parties and affirming approval of Petitioner's application to change the point of diversion of the water rights involved herein is printed in Appendix B, hereto, *infra*, p. A30.

JURISDICTION

The Order of the Court of Appeals reversing the Judgment of the District Court was entered October 12, 1967, and the Motion to Stay Proceedings pending determination of a declaratory judgment action in the State Courts of New Mexico, was denied February 1, 1968. Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTION PRESENTED

In a diversity suit, should the Court of Appeals have stayed further proceedings, in order to allow the New Mexico Courts, in a case pending therein, to decide whether a state statute granting the power of eminent domain to private as well as public entities, thereby permitting condemnation of rights-of-way for the conveyance of water

for application to beneficial use, violates the State Constitution, where there are no New Mexico decisions directly in point and the issue is of vital importance to the State of New Mexico?

STATUTES INVOLVED

The provisions of the New Mexico Constitution involved are Art. II, Sec. 20, and Art. XVI, Secs. 1-3, printed in Appendix A hereto, *infra*, p. A1. The statutory provisions involved are N.M.S.A., Sec. 75-1-3 (1953), N.M.S.A., Sec. 68-2-1 (1953), and N.M.S.A., Sec. 22-9-22, printed in Appendix A hereto, *infra*, pp. A1-A3.

STATEMENT

Respondent filed a diversity suit in the United States District Court for the District of New Mexico for damages and permanent injunctive relief, alleging that Petitioner trespassed upon Respondent's land, drilled stream diversion wells, and laid a water pipeline thereon (Tr. 2, R. 1-3). Petitioner moved to dismiss upon the ground that New Mexico's inverse condemnation statute, N.M.S.A., Sec. 22-9-22 (1967 Supp.), as construed in *Zobel* v. *Public Service Co.*, 75 N.M. 22, 399 P.2d 922 (1965), was Respondent's exclusive remedy. By Affidavit, Petitioner showed that it is the Lessee of lands in Colfax County, New Mexico, upon which a coal processing plant had been constructed, and is the owner of recognized water rights for beneficial use at its coal processing plant, approved by the New Mexico State Engineer (Tr. 2, R. 13; See also, *W. S. Ranch Co.* v. *Kaiser Steel Corp.*, N.M. Sup. Ct. No. 8368, March 18, 1968, 6 N.M. State Bar Bull. 471, printed in Appendix B, *infra*, p. A30); that the diversion wells and pipeline are located entirely within the right-of-way of the Atchison, Topeka & Santa Fe Railway branch line, and that to allow

beneficial use of the waters necessary for operation of the plant, the diversion wells and pipeline must be upon and must cross Respondent's property.

In its Brief in the District Court, Petitioner requested the District Judge, if he doubted Petitioner's power of eminent domain, to stay the action pending resolution of that question by the State Court (Supp. Tr. 1).

Section 75-1-3 (N.M.S.A. 1953) expressly authorizes condemnation of private land for the conveyance of water for its application to beneficial use, and Petitioner's use of the water is clearly a beneficial use. See *W. S. Ranch Co.* v. *Kaiser Steel Corp.*, N.M. Sup. Ct., March 18, 1968, *supra*. The issue was thus narrowed to whether Section 75-1-3 violates Art. II, Sec. 20 of the New Mexico Constitution, prohibiting the taking of private property for public use without just compensation, and specifically whether the taking was for a "public" use.

The District Court held that the condemnation of land for purposes of distributing water to a beneficial use was a taking for public use under New Mexico law and held the statute constitutional. The Court concluded that since Petitioner had the right to exercise the power of eminent domain, Respondent's exclusive remedy was New Mexico's inverse condemnation statute, Section 22-9-22, *supra* (Tr. 2, R. 14-19). From an Order dismissing the action (Tr. 2, R. 20), Respondent appealed to the United States Court of Appeals for the Tenth Circuit (Tr. 2, R. 21).

On October 12, 1967 (Tr. 4), the Tenth Circuit reversed the District Court. While conceding that the question had never been presented to the New Mexico Courts and that its decision "must necessarily have a far-reaching effect," the Court reasoned that "public use" must be measured

by "ultimate use"; that the use of water for coal mining purposes was not a "public use" and, therefore, the statute was unconstitutional insofar as it granted the power to exercise eminent domain in aid of coal mining (Tr. 4). In so ruling, the Court noted that it was "reluctant to disagree with the New Mexico trial judge interpretating New Mexico law."

Petitioner moved for rehearing and also moved to stay proceedings pending a determination of the controlling issue of state law in a declaratory judgment action it had filed in the State Court on the same day, and which is now pending in the State Court (Tr. 6; Supp. Tr. 1). Both Motions were denied on February 1, 1968, Judge Brown dissenting from denial of the Motion to Stay (Tr. 11, 12).

REASONS FOR GRANTING THE WRIT

POINT I

The Court of Appeals Has Decided a Vital State Constitutional Issue in a Manner Which Is or Maybe in Conflict with Applicable State Law.

If the question of state law decided by the Court of Appeals were a proper one for decision by a Federal Court, sufficient authority and reason exist to warrant review and reversal of that Court's decision on the merits. However, the question of state law, apart from being difficult, is also of major importance to New Mexico, and this case presents not only the issue of whether the Court of Appeals decided the state question correctly, but the more fundamental issue of whether it should have decided the state question at all. For that reason, Petitioner foregoes a review on the merits and urges this Court to review and reverse the Court of Appeals' order refusing to stay proceedings.

In order to demonstrate the necessity of abstention, some discussion of the state-law issue is required, if only to show its difficulty and its importance to the state. Petitioner and the District Judge construe New Mexico law as declaring a public use in the distribution of the state's waters for application to a beneficial use, and providing that if the use is in fact beneficial, the power of eminent domain can be exercised by private parties for distribution of the waters from the point of diversion to the point of application. The New Mexico Constitution establishes public ownership of all unappropriated waters, "subject to appropriation for beneficial use," N. M. Const., Art. XVI, Sec. 2, and makes "beneficial use" the basis, measure and limit of the right to use water. Art. XVI, Sec. 3. Application to a beneficial use is essential to a completed appropriation of water. *State ex rel. State Engineer* v. *Crider*, 78 N.M. 312, 431 P.2d 45 (1967). New Mexico, like other arid Western States, thus rejected the riparian theory of water ownership, as economic conditions did not permit exclusive dominion over water dependent solely upon geographic location adjacent to a stream. See *Albuquerque Land & Irrig. Co.* v. *Gutierrez*, 10 N.M. 177, 61 Pac. 357 (1900), *aff'd* 188 U.S. 545 (1903); *Lindsey* v. *McClure*, 136 F.2d 65 (10th Cir. 1943).

Appropriation, the basis of New Mexico's water law, consists first of diverting the water from a natural stream; second, transporting it to the point of use; and, ultimately, applying it to the particular beneficial use. The right to *transport* the waters is crucial, for otherwise there can be no assurance that the public waters will be used except for uses on lands lying adjacent to the point of diversion, thereby permitting owners of vast acreages of land, of which there are many in the State, to monopolize the public water and effectively restrict development of the State's resources and industries in the greater areas of the State which do not adjoin a live stream system.

In order to guarantee that the public waters can be used by other than riparian owners, the Territorial Legislature in 1907 enacted Section 75-1-3, giving any person, firm or corporation the right of eminent domain for the construction, maintenance, and operation of pipelines and other works for the "conveyance of water for beneficial uses." The necessity for such a grant of the eminent domain power has been recognized by the State Court in *Threlkeld* v. *Third Judicial Dist. Ct.*, 36 N.M. 350, 355, 15 P.2d 671, 673 (1932).

> ". . . we . . . [have] a policy, . . . time-honored, as to waters. We had nationalized them. Not as a source of public revenue, as minerals are retained for royalties; but as an elemental necessity, like air, which must not be allowed to fall under private control. Only by invoking the power of eminent domain can the state distribute its own water as its public policy requires. A right of way taken for that purpose is in a large sense devoted to the public use. This policy finds general and express recognition in the Constitution. It is impossible to suppose that any interpretation of 'public use' was intended to upset it."

While no case involving mining has arisen under Section 75-1-3, distribution of water for application to a beneficial use has repeatedly been held a public use. See *Albuquerque Land & Irrig. Co.* v. *Gutierrez*, 10 N.M. 177, 61 Pac. 357 (1900), *aff'd* 188 U.S. 545 (1903); *City of Albuquerque* v. *Garcia*, 17 N.M. 445, 130 Pac. 118 (1913); *Pueblo of Isleta* v. *Tondre*, 18 N.M. 388, 137 Pac. 86 (1913); *Young* v. *Dugger*, 23 N.M. 613, 170 Pac. 61 (1918); *State ex rel. Red River Valley Co.* v. *District Court*, 39 N.M. 523, 51 P.2d 239 (1935). Section 75-1-3 has been upheld as authorizing a private party to condemn for the purpose of irrigation, the only "ultimate

use" heretofore considered under the statute. *Young* v. *Dugger, supra.*

Against this background, the Court of Appeals concluded that the power to condemn must be measured only by "ultimate use." Dismissing the prior State Court construction of Section 75-1-3 as dealing solely with the ultimate use of irrigation, the Court found its answer in *Gallup American Coal Co. v. Gallup Southwestern Coal Co.*, 39 N.M. 344, 47 P.2d 414 (1935), a case having nothing to do with New Mexico water law, but one in which the business of coal mining was held not to be affected with a public use sufficient to justify upholding of a statute giving coal companies general powers of condemnation. The Court concluded that Section 75-1-3, therefore, violated the New Mexico Constitution if applied in aid of coal mining. This decision implies some special status for farmers, or some distinction between irrigation, mining, and other beneficial uses of water, all of which are conspicuously absent from New Mexico law. The Court of Appeals also overlooked a legislative declaration in N.M.S.A., Sec. 68-2-1 (1953), that the *supplying* of water for mining was a public use and a judicial confirmation of that declaration in *Albuquerque Land & Irrig. Co.* v. *Gutierrez, supra,* which held that lands condemned for the purposes specified in Section 68-2-1 are for a public purpose.

The divergence between the opinions of the District Court and the Court of Appeals, while perhaps explainable in light of the above statutes and decisions, points up the difficulty of the question, which was acknowledged by the Court of Appeals:

> "It is conceded that this precise question . . . has never been presented to the New Mexico Courts. * * * The case law is not decisive. . . ."

(Opinion, Tr. 4, p. 5). Even transcending the difficulty of the state-law question, however, is its importance to the State. As the Court of Appeals admitted:

> ". . . the decision in this case must have a far-reaching effect. . . . [I]f the 'beneficial use' is to be determined by the *ultimate use* to which the water is put, then even though an individual or industry may secure a valid right to take water from the public sources, there can be no assurance of any means of diverting the water from its source to the place of use, and industry and growth of the State could be severely hampered."

(Opinion, Tr. 4, p. 5). See also, dissenting opinion, Tr. 11, pp. 13-14:

> ". . . the real peril of this decision is that the victim is in no real sense either party to the cause. The one suffering is the state and its carefully nurtured, domestically contrived public policy."

The obvious importance of the question to the State is revealed by its Motion for leave to appear as Amicus Curiae in the Court of Appeals prior to consideration of the Motions for rehearing and to stay proceedings (Tr. 8; See also, dissenting opinion, Tr. 11, p. 14, n. 17) and by its Amicus Curiae Brief filed in this Court. The appearance of the State's highest law officer is strongly indicative, if not determinative, of the great public importance of this question to the State. See *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 324 (1943).

The Court of Appeals' decision is an intrusion upon the State's policies in at least three areas of sovereign prerogative: (1) Conservation and development of an extremely important natural resource; (2) Delegation of the power of eminent domain; and (3) Promotion and protection of economic development. The decision is probably in conflict with what the State Court would decide,

and calls for review by this Court to prevent an unnecessary disruption of state policy by the Federal Court.

POINT II

The Decision of the Court of Appeals Is in Conflict with Applicable Decisions of This Court.

The Court of Appeals' refusal to stay proceedings is in direct conflict with *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959), where, as here, a Federal Court was asked to determine the validity of a state grant of the power of eminent domain. As in this case, the state issue was difficult, and few guidelines were provided for the Court's decision. This Court held that "exceptional circumstances" existed calling for abstention, noting that:

> "The fundamental fact is that eminent domain is a prerogative of the state, which, on the one hand, may be exercised in any way that the state sees fit, and on the other, may not be exercised except by an authority which the state confers.
>
> * * *
>
> "The issues normally turn on legislation with much local variation interpreted in local settings. The considerations that prevailed in conventional equity suits for avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities are similarly appropriate in a state eminent domain proceeding brought in, or removed to, a federal court."

Apart from being a delegation of the State's power of eminent domain, Section 75-1-3 is also, in the words of the New Mexico Supreme Court, part of a "comprehensive code of laws in 73 sections for the conservation, development, and beneficial use of the public waters of the state. . . ." *State ex rel. Red River Valley Co.* v. *District Ct. of 4th Judicial Dist.*, *supra*, 39 N.M. at 526, 51 P.2d at

240. The Court of Appeals' refusal to stay proceedings, is, therefore, in conflict with several decisions of this Court which have recognized that the possible conflict between a federal decision and state policies developed pursuant to such a unified scheme of resource development is in itself an "exceptional circumstance" calling for abstention. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951). In *Burford*, abstention was upheld in a suit by oil companies seeking to enjoin an Order of the Texas Railroad Commission, this Court noting:

> "The order under consideration is part of the general regulatory system devised for the conservation of oil and gas in Texas. . . .
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> * * *
>
> "Texas interests in this matter are more than that very large one of conserving gas and oil, two of our most important natural resources. It must also weigh the impact of the industry on the whole economy of the state. . . ."
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> * * *
>
> These questions of regulation of the industry by the state administrative agency . . . so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them. . . ." 319 U.S. at 318, 320, 332.

The above decisions of this Court, recognizing delegation of the power of eminent domain and unified state schemes for development of resources as "exceptional circumstances" calling for abstention, imply the importance of those areas of sovereign prerogative in the economic growth of the Western States. This relation of water law and the power of eminent domain to economic develop-

ment was long ago recognized by Congress in the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C., Sec. 661 (1958), which recognized and confirmed priority rights on the public domain to appropriation and use of water for mining as well as agricultural, manufacturing, and other uses, to the extent such rights were recognized under local law. That statute also recognized the importance of transportation of waters for such purposes:

> ". . . the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

This Act was intended to protect existing industries and to promote industrial development in the Western States, *United States* v. *Hunter*, 236 F. Supp. 178, 181 (S.D. Cal. 1964), and recognized, so far as the United States is concerned, the validity of local customs, laws and decisions respecting the appropriation of water, *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U.S. 704 (1899). The refusal of the Court of Appeals to stay proceedings, in a case directly and adversely affecting the state's water law, eminent domain law and economic development, conflicts with the recognition of the prerogative of the states in these areas implicit in this Court's prior decisions and inherent in the Act of July 26, 1866.

Even apart from the direct conflict with prior decisions of this Court and with the specific underlying principles of those decisions, the refusal to stay proceedings conflicts in principle with prior decisions of this Court delineating the purpose of the abstention doctrine itself. The rationale of the doctrine is that a federal court should not decide

difficult and unsettled questions of state law in a manner which might conflict with important policies of the state, and that recognition of the final authority of the state court to pass upon the question and the need for harmonious relations between the state and federal systems justifies abstention or a stay of proceedings to allow for determination of the controlling issue by the state court. *Railroad Comm'n of Texas* v. *Pullman Co., supra,* 312 U.S. at 500-01.

> "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. * * * These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard' for the rightful independence of the state governments' and for the smooth working of the federal judiciary. * * * This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers."

The Court of Appeals' decision on the merits will obviously have a severe effect upon economic development in New Mexico, and is tantamount to an attempt to formulate the state's policies in that area as well as the areas of water law and eminent domain. This case fits within the basic purpose of the abstention doctrine as defined by *Pullman* and subsequent decisions of this Court, and the Court of Appeals' refusal to stay proceedings conflicts in principle with those decisions.

The principles of the abstention doctrine would also seem to dictate recognition of the state's special concern in construing its statutes under its own constitution. Although not specifically passed upon by this Court as a

ground for abstention, lower federal courts have recognized that they should be particularly hesitant to strike down a statute as unconstitutional under the *state* constitution. *Miller* v. *City of Greenville*, 138 F.2d 712, 718-19 (8th Cir. 1943); *Sherwood* v. *Bradford*, 246 F. Supp. 550, 552 (S.D. Cal. 1965); *B-W Acceptance Corp.* v. *Torgerson*, 234 F. Supp. 214 (D. Mont. 1964).

In addition to the direct conflicts and conflicts in principle with prior decisions of this Court, there is nothing in any of this Court's prior decisions justifying refusal to abstain. Abstention cannot be denied on the basis that this is a diversity case, for although abstention is most often applied to avoid striking down an ambiguous state statute where jurisdiction is based upon a federal constitutional question, *Zwickler* v. *Koota*, 389 U.S. 241 (1967), it is applicable, and there is perhaps even more reason for applying it, in a diversity case involving unsettled issues of state law plus "exceptional circumstances." See *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959). In a diversity case, if abstention is refused and an unsettled issue of state law is decided, the parties have no right to appeal that decision to the court having the final word on the issue, as exists when abstention is granted in a federal question case, *England* v. *Louisiana State Bd. of Med. Exam.*, 375 U.S. 411 (1964). See *United Serv. Life Ins. Co.* v. *Delaney*, 328 F.2d 483, 487 (5th Cir. 1964) (concurring opinion, Brown, J.), *cert. denied* sub nom. 377 U.S. 935 (1964). See also dissenting opinion herein, Tr. 11, pp. 6-9. No justification for the refusal to stay proceedings is found in the fact that the decision is binding only upon the parties, and can be upset by a later authoritative determination of the state court, for such an argument ignores the admitted effect the decision must have upon administration of the state's water policies and upon decisions by private individu-

als who might be planning to establish sorely needed new industry in the state. See opinion, Tr. 4, p. 5; see also Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 Yale L. J. 850, 863 (1964).

As the State Court has never spoken on the issue and "exceptional circumstances" heretofore defined by this Court are present, *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943) does not justify the lower decision; nor does *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959), as this case does not present the resolution of a fact issue against the background of settled state law. In addition, prior decisions of this Court in no way justify a denial of abstention because of the fact that the Tenth Circuit was asked to abstain after its adverse decision on the merits. Petitioner, in connection with its motion to dismiss in the District Court, requested the District Judge to abstain if he had any doubts whatsoever regarding Petitioner's power to condemn (Supp. Tr. 1, Exhibit B to Motion to Stay Proceedings; dissenting opinion, Tr. 12, p. 15, n. 18). As Judge Brown noted in his dissenting opinion:

> ". . . the fact that the motion is now made after the adverse decision of this Court, while a powerful circumstance in many situations, does not prevent the exercise of abstention now in view of these great public stakes."

Tr. 11, pp. 14-15. In fact, abstention has often been applied for the first time in this Court, and in the Courts of Appeals, after an adverse decision on the merits. See, *e.g.*, *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134 (1962); *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957); *Green* v. *Phillips Petroleum Co.*, 119 F.2d 466 (8th Cir. 1941), *cert. denied* 314 U.S. 637 (1941); *United Serv. Life Ins. Co.* v. *Delaney*, *supra*.

Because of the important concepts of federalism embodied in the doctrine of abstention, however, any delay in presenting the doctrine should not affect its availability here. Questions of grave significance to the State of New Mexico, and profoundly affecting its policy, have been decided. The conflict between the federal and state systems, and the conflict between the decision below and prior decisions of this Court, is in no way lessened by a holding that delay in presenting the doctrine precludes its use.

POINT III

The Decision of the Court of Appeals Is in Conflict, at Least in Principle, with Decisions of Other Courts of Appeals on the Same Matter.

The Tenth Circuit, along with several other Circuits, has lost sight of the salutary reasons behind the creation of the abstention doctrine so clearly pointed out by this Court in *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941).

These Circuits instead have limited the application of the doctrine to the fact situations previously decided by this Court and have held that abstention is confined to cases involving federal constitutional questions, specific disruption of state administrative processes, interference with the collection of state taxes, or injunctions against state officials. See *Martin* v. *State Farm Mut. Auto. Ins. Co.*, 375 F.2d 720 (4th Cir. 1967); *Liberty Mut. Ins. Co.* v. *Pennsylvania R.R.*, 322 F.2d 963 (7th Cir. 1963). Abstention has been refused in cases involving state regulation of the practice of medicine or chiropracty, *United States* v. *Shock*, 379 F.2d 29 (8th Cir. 1967); construction of state laws governing horse racing, *Amsley* v. *West Virginia Racing Comm'n*, 378 F.2d 815 (4th Cir. 1967); and interpretation of state chattel mortgage statutes in a bankruptcy pro-

ceeding, *In re Mohammed*, 327 F.2d 616 (6th Cir. 1964), *Cf. Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940).

On the other hand, other Circuits have had little difficulty in extending the doctrine beyond prior fact situations decided by the United States Supreme Court. *United Serv. Life Ins. Co.* v. *Delaney, supra* (interpretation of an insurance policy under state law); *Tomiyasu* v. *Golden*, 358 F.2d 651 (9th Cir. 1966) (attack upon a State Court Judgment). The difference in philosophy and principle, at least, between these Circuits is thus readily apparent, as is the conflict between the decision in this case and the principles expressed in *Delaney, supra.* See Dissenting Opinion of Judge Brown, Tr. 11, pp. 6-9, 15-17.

In addition, there is a direct and irreconcilable conflict between the Fourth and Fifth Circuits as to the scope of the abstention doctrine in a diversity case involving the construction of an insurance policy under unsettled state law. Compare *Martin* v. *State Farm Mut. Auto. Ins. Co., supra,* with *United Serv. Life Ins. Co.* v. *Delaney, supra.* This conflict continues to develop, and the Court of Appeals' refusal to abstain, if allowed to stand, will contribute to a wider divergence of opinion.

POINT IV

The Tenth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

As stated in Point III, *supra,* a conflict exists on the subject of abstention in diversity cases among the Circuits. Furthermore, there would even appear to be a conflict in principle between the decisions of this Court. In *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940), the

Court abstained from deciding a difficult and unsettled question as to the proper interpretation of a conveyancing instrument under state law, whereas in *Meredith* v. *Winter Haven*, *supra*, it was held that abstention was not justified simply because the state-law question was difficult and unsettled. See *Louisiana Power & Light Co.* v. *City of Thibodaux*, *supra*, 360 U.S. at 27.

Commentators and Courts alike express confusion regarding application of the doctrine in diversity cases, primarily centering about discussion of the effect of *Thibodaux* upon *Meredith*. See *e.g.*, Note, *Abstention and Certification, etc.*, *supra*, 73 Yale L. J. at 853; Note, *Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 Harv. L. R. 604, 622 (1967); *MachTronics, Inc.* v. *Zirpoli*, 316 F.2d 820 (9th Cir. 1963); *White* v. *Husky Oil Co.*, 266 F. Supp. 239, 241 (D. Mont. 1967); *Schenley Industries, Inc.* v. *New Jersey Wine & Spirit Wholesale Ass'n*, 272 F. Supp. 872 (D. N.J. 1967). A listing of all the decisions, law review articles and texts which have puzzled over the scope of the abstention doctrine in diversity cases would serve no useful purpose, the commentators being mainly in agreement that the law is unsettled in this area and a further expression would be of great aid in the administration of justice in the Federal Courts.

The abstention doctrine and its guidelines have perhaps been better understood by the Courts in cases where federal jurisdiction is founded upon a federal question than when it is based upon the geographical accident of diversity of citizenship. In *Zwickler* v. *Koota*, 389 U.S. 241 (1967), this Court took the opportunity to restate and clarify the rules governing the application of the doctrine in federal constitutional cases. Yet the guidelines for the

application of abstention in diversity cases are more obscure and less understood than were the principles to be applied in a case arising under the federal constitution prior to *Zwickler, supra.* Even beyond the importance of review of this case to the parties and the State of New Mexico, the increased volume of litigation in the Federal Courts and the recurring frequency with which the doctrine of abstention is raised make it paramount that the Court speak.

POINT V

The Importance of the Question, and the Departure in the Decision Below from Accepted and Usual Principles Governing the Resolution of Controversies in Our Federal System, Call for an Exercise of This Court's Power of Supervision.

The decision of the Tenth Circuit struck down a state statute which had previously been upheld by the highest court of the state in cases involving other beneficial uses of water and which had rested undisturbed as part of a well-considered and important local policy for 61 years. Such an intrusion into the sovereign policy of New Mexico concerning its public waters, economic development and delegation of the power of eminent domain, in a case where the Court recognized that the "case law is not decisive" and that it was prognosticating, is far beyond the purpose and intent of diversity jurisdiction.

Recognition and preservation of the principles of federalism upon which this country was founded is at least as important as guarding the exercise of diversity jurisdiction by the District Courts. Indeed, the historic reason for diversity jurisdiction, to protect the foreign litigant from unfair or biased treatment in the State Courts, *Burford* v. *Sun Oil Co., supra,* 319 U.S. at 336 (Frank-

furter, J., dissenting opinion) does not apply here as Petitioner, the Defendant below and the party now trying to get into the state court, is the foreign corporation.

The abstention doctrine has a necessary function in avoiding unnecessary and undesirable conflicts between State and Federal Governments, and thus preserving the delicate balance of federal-state relations inherent in our concept of federalism. The decision of the Court of Appeals is so far a departure from the recognized principles governing exercise of the doctrine that the Court's supervisory power should be invoked. The abstention doctrine is, after all, a "judge-made doctrine," *Zwickler* v. *Koota, supra,* 389 U.S. at 248, and this Court is the only place to which Petitioner, the State of New Mexico or the Federal District and Circuit Courts might look for its clarification.

Petitioner recognizes that this Court's supervisory power is a restricted and discreetly employed tool, but submits that a decision by a Federal Court in conflict with the well-reasoned purpose behind the abstention doctrine and the decisions of *Burford* v. *Sun Oil Co., supra,* and *Louisiana Power & Light Co.* v. *Thibodaux, supra,* and which could strike a serious blow to the economic development of a sovereign state, calls for the exercise of that power. This surely is a case where "scrupulous regard for the rightful independence of state governments and for the smooth working of the federal judiciary" counsels application of the abstention doctrine pending resolution of the controlling state issue by the State Courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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